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No. 76-530

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAPHAELA MARTINEZ, PETITIONER

v.

LAWRENCE SCHROCK, M.D., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
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OPINIONS BELOW

The opinion of the court of appeals (*en banc*) (Pet. App. A3-A21) is reported at 537 F. 2d 765. The opinion of the district court (Pet. App. A22-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1976. The petition for a writ of certiorari was filed as of September 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether military physicians are immune from personal liability in malpractice suits arising from their performance of official duties.

STATEMENT

As the opinion of the court of appeals states (Pet. App. A3), petitioner is the representative of a retired enlisted man who died shortly after a gall bladder operation performed on him by respondents, who are Army surgeons at Walson Army Hospital, Fort Dix, New Jersey. Petitioner brought survival and wrongful death actions in New Jersey state court, contending that respondents had been negligent in the performance of the operation and that the negligence had caused the death (see Pet. App. A25-A26). The case was removed to the United States District Court for the District of New Jersey (Pet. App. A22).

The district court granted respondents' motion to dismiss, holding that, as officers in the Medical Corps of the United States Army, respondents are immune from any personal liability for acts done within their line of duty (Pet. App. A22-A24). The district court noted that petitioner was "entitled to bring an action against the United States under the Federal Tort Claims Act" for the alleged malpractice (Pet. App. A23). (The court of appeals at the oral argument of this case was advised that petitioner had filed a timely claim under the Federal Tort Claims Act (Pet. App. A6).)

The court of appeals, sitting *en banc*, affirmed (Pet. App. A3-A21). Applying the "broad directives" from this Court in *Barr* v. *Matteo*, 360 U.S. 564, and *Doe* v. *McMillan*, 412 U.S. 306,[1] the majority concluded that

[1]The "starting point" in the majority's analysis was the Third Circuit's decision in *Bailey* v. *DeQuevedo*, 375 F. 2d 72, 74, certiorari denied, 389 U.S. 923, which held that "an enlisted man in the armed services of the United States cannot maintain an action against an Army medical surgeon for negligence in an operation performed at an Army hospital in line of duty" (see Pet. App. A3). The court recognized, however, that whereas the plaintiff in *Bailey* was an active duty soldier, the plaintiff here (petitioner) is a civilian representative of a retired enlisted man, and therefore that a principle rationale in *Bailey*—*i.e.*, that "one soldier may [not] sue another for negligent acts performed in the line of duty"—was unavailable as a ground for decision in this case (Pet. App. A4). The majority therefore proceeded to an analysis of the factors broadly outlined in *Doe* v. *McMillan*, *supra*, and *Barr* v. *Matteo*, *supra*.

there were "significant public policy considerations at work here which tip the balance in favor of immunity" (Pet. App. A5). In particular, the court reasoned that the threat of personal liability to military doctors, who generally do not have malpractice insurance,[2] would substantially impair the government's ability to recruit doctors for the military and might lower the level of health care in the armed services (Pet. App. A6-A7). The court held that the "contribution of immunity to effective government" in this regard "outweighs the * * * harm to individual citizens who, in fact, have recourse under the Federal Tort Claims Act" (Pet. App. A9).[3]

[2]In addition to the court's finding that "malpractice insurance is not involved here" (Pet. App. A6) the court referred to a finding in a House Committee on Armed Services Report (see Pet. App. A7-A8, n. 5) that generally there is no insurance coverage involved in malpractice suits against military doctors.

The court also concluded (Pet. App. A7) that "[i]t could hardly be suggested that the purchase of costly insurance would provide a solution for the more modestly compensated military doctor."

[3]Judge Adams concurred in the judgment of the court, but emphasized that he would strike the balance on the particular facts of each case (Pet. App. A10-A16).

Judges Seitz and Gibbons dissented on the ground that military doctors were not entitled to immunity because they were exercising medical, rather than governmental, discretion (Pet. App. A16-A21).

DISCUSSION

1. Petitioner contends principally (Pet. 3-6) that this Court should grant her petition for a writ of certiorari to resolve a conflict between the Third Circuit's decision in this case and the District of Columbia Circuit's decision in *Henderson* v. *Bluemink*, 511 F. 2d 399. *Henderson* also involved a malpractice suit against a military doctor. The court of appeals there held, in apparent contradistinction to the Third Circuit, that a military doctor was not immune from such suits merely because he is a government employee acting within the scope of his discretionary duties (511 F. 2d at 402-403).[4]

Although there thus appears to be a conflict among the circuits concerning whether military physicians are immune from malpractice suits arising from their performance of official duties, the question has recently been resolved for future cases by statute. On October 8, 1976, the President approved a law that immunizes physicians in the military from malpractice suits. Pub. L. 94-464, 90 Stat. 1985-1989. The new statute provides that "[t]he remedy against the United States provided by [the Federal Tort Claims Act] * * * for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician * * * of the armed forces * * * while acting within the scope of his duties * * * shall hereafter be exclusive of any other civil action * * * against such physician * * * ." *Ibid.* The immunity afforded military doctors by this new statute does not

[4]The court of appeals in *Henderson* remanded the case for the further consideration whether immunity was necessary in order "not to jeopardize 'the quality and efficiency of government itself' by exposing the exercise of discretion in the formulation of governmental policy to the * * * sanction of tort liability" (511 F. 2d at 402; emphasis omitted, quoting from *Spencer* v. *General Hospital of the District of Columbia*, 425 F. 2d 479, 481 (C.A. D.C.)).

pertain to the instant case because the statute "appl[ies] only to those claims accruing on or after [the] date of [the statute's] enactment." *Ibid.* But because of the statutory resolution of the issue, the apparent conflict among the circuits does not have prospective importance warranting this Court's resolution.

2. The government has filed a petition for a writ of certiorari in *Butz* v. *Economou*, No. 76-709, that presents somewhat related questions concerning the immunity of federal government officials from damage suits based upon acts done as a part of their official duties.[5] In *Economou* the Second Circuit held that federal officials sued for damages based upon their performance of official duties in connection with administrative enforcement proceedings have only a qualified, not an absolute, immunity (535 F. 2d 688). As we explained in our petition, the court of appeals in *Economou* believed (erroneously, we submit), that subsequent cases had overruled or limited *Barr sub silentio*.

Both the factual setting of *Economou* and the specific question presented in our petition in that case are quite different from the facts and question presented here. Nevertheless, the court of appeals in this case appears to have based its analysis at least in part upon the "broad directives from the Supreme Court" in *Barr* v. *Matteo*, *supra* (Pet. App. A5; see note 1, *supra*). Since the continuing validity and scope of *Barr* have been called into question by the court of appeals in *Economou*,

[5]Petitioner is being furnished with a copy of our petition in *Economou*.

this Court may deem it appropriate to hold this petition pending its disposition of *Economou*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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